No. 02-815

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In The
Supreme Court of the United States

CITY OF SACRAMENTO and MIKE KASHIWAGI,
Director of the Department of
Public Works of the City of Sacramento,
in his official capacity,

Petitioners,

v.

JOAN BARDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE CITIES OF ALBANY, GA, BIRMINGHAM, AL, BOSTON, MA, DALLAS, TX, DES MOINES, IA, DETROIT, MI, DOVER, DE, LITTLE ROCK, AR, MEMPHIS, TN, MILWAUKEE, WI, NASHVILLE, TN, NEW YORK, NY, PHOENIX, AZ, PITTSBURGH, PA, SAINT PETERSBURG, FL, AND THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the cities of Albany, GA, Birmingham, AL, Boston, MA, Dallas, TX, Des Moines, IA, Detroit, MI, Dover, DE, Little Rock, AR, Memphis, TN, Milwaukee, WI, Nashville, TN, New York, NY, Phoenix, AZ, Pittsburgh, PA, Saint Petersburg, FL, and the U.S. Virgin Islands (collectively, "*Amici Curiae*" or "*Amici*") respectfully submit this Brief as *amici curiae* in support of the Petition for Writ of Certiorari filed by the City of Sacramento.[1]

The *Amici Curiae*, all of whom are public entities or associations of representatives of public entities, share an interest in the proper interpretation and application of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 because these statutes require public entities to meet certain accessibility standards related to disabled individuals. The *Amici* have a vital interest in ensuring that the accessibility requirements mandated by the courts conform to the statute, and are interpreted as Congress intended.

Founded in 1924, the National League of Cities ("League") is the oldest and largest national organization

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[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court. Counsel for the parties to this action did not author this brief, in whole or in part. No person or entity other than *Amici Curiae*, their members and their counsel made monetary contributions to the preparation or submission of this brief.

representing municipal governments throughout the United States. The League serves as a national resource and advocate on behalf of over 1,700 member cities and 49 municipal leagues whose membership totals more than 18,000 cities and towns across the United States. The League's mission is to strengthen and promote cities as centers of opportunity, leadership and governance.

The U.S. Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,183 such cities in the United States today. Each city is represented in the Conference of Mayors by its chief elected official, the mayor. The Conference of Mayors seeks to promote the development of effective national urban/suburban policy, strengthen federal-city relationships, ensure that federal policy meets urban needs, provide mayors with leadership and management tools, and create a forum in which mayors can share ideas and information. During its annual meeting, the Conference of Mayors through its membership of mayors adopts policy positions reflecting their collective views on serious urban problems and possible solutions.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. IMLA's membership is comprised of local government entities, including cities and counties, state municipal leagues, and individual attorneys who represent municipalities, counties, and other local government entities. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts, providing services and educational programs to local governments and their attorneys since 1935. Since its establishment, IMLA has advocated for the rights and

privileges of local governments. Specifically, the Legal Advocacy Program of IMLA serves the membership by advocating the nationwide interests, positions, and views of local governments on legal issues.

Sixteen *Amici* are large public entities subject to the accessibility requirements of Title II of the Americans with Disabilities Act. Of these, fifteen are cities in the United States and one (the U.S. Virgin Islands) is a territory of the United States. All of the *Amici,* through their counsel of record, have consented to the filing of this *Amici* brief.

Amici's specific interest in this case lies in the impact the Ninth Circuit's decision will have on state and local governments throughout the United States. Over 39,000 local governments (including counties, towns and municipalities) exist in the United States. State and local governments have already spent hundreds of millions of dollars in public funds to satisfy the accessibility mandates set forth in the ADA. The Ninth Circuit's decision significantly expands the scope of the ADA, and requires expenditures for accessibility that far exceed those mandated by the ADA. If permitted to stand, the Ninth Circuit's decision will severely diminish the already strained coffers of state and local governments, forcing the public entities to allocate an untenably large proportion of scarce, limited public funds to ADA compliance. Accordingly, *Amici* file this brief on behalf of its members' nationwide.

In addition, *Amici* support Petitioners' Writ of Certiorari because they have a keen interest in ensuring that the Ninth Circuit, and all courts, follow the law. By improperly extending the accessibility requirements beyond the plain language and intent of the underlying statutes, the Ninth

Circuit acted beyond the scope of its authority, with staggering fiscal ramifications for state and local governments in the Ninth Circuit and throughout the United States.

For these reasons, *Amici* respectfully submit this Brief in support of the Petition for Writ of Certiorari filed by the City of Sacramento.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act of 1990 ("ADA") introduced new and sweeping requirements for public entities to provide greater access to persons with disabilities. Balancing the public interest in achieving accessibility for disabled persons against the burden on public entities of shouldering tremendous financial costs, Congress enacted a statutory framework to achieve universal accessibility through immediate access to programs but more gradual, incremental implementation of access to facilities. The ADA requires the *programs* of public entities ("programs, services and activities") to be readily accessible to disabled persons immediately. However, mindful of the significant financial impact of physical changes to *facilities* (the buildings, roads, sidewalks and other physical infrastructure of public entities), the ADA does not require immediate access to facilities but instead imposes an accessibility requirement only when the public entity alters the facility, constructs new facilities, or when facility modification is the only way to make programs accessible.

By enforcing program accessibility immediately and requiring facility accessibility primarily when the public

entity chooses to alter or to construct facilities, Congress built a legal structure to implement the goals of the ADA over a reasonable time period while preserving the ability of the public entity to prioritize its expenditure of limited financial resources. The public entity need only comply *immediately* with the program accessibility standard, and can achieve program accessibility even when its facilities are not accessible. This important distinction between the requirements for programs and the requirements for facilities lies at the core of the effective implementation of the plan carefully crafted by Congress.

The Ninth Circuit decision disregards this central distinction and attempts to apply the program accessibility standard to facilities. The Ninth Circuit in this case held that a physical sidewalk (and, by implication, every public building, structure and right of way) is a "program" for purposes of enforcing Title II of the ADA and Section 504 of the Rehabilitation Act. The decision requires the City of Sacramento, and every other public entity, to make all facilities accessible immediately. This is contrary to the statutory language and regulations at issue and imposes on public entities an extraordinary financial burden not contemplated by Congress or articulated in the statute.

The legal alchemy of transmuting a facility into a program simply because the facility is owned or maintained by the public entity disregards the statutory framework and ignores the common sense definition of the terms chosen by Congress. Under the Ninth Circuit's new definition of "program," every building, sidewalk, bridge, road and other physical structure owned or operated by a public entity would be subject to immediate accessibility requirements, achievable only at a staggering financial cost.

The ADA implementation scheme crafted by Congress is demolished by the Ninth Circuit decision. The public entity is stripped of its statutory right to choose an appropriate method for making programs accessible, and must instead devote huge sums to immediate alteration or new construction of facilities. The Ninth Circuit's decision wrongly interprets the law and as a result, wrongly imposes enormous financial burdens not contemplated by the statutes.

ARGUMENT

I. IN RECOGNITION OF THE ENORMOUS BURDEN INHERENT IN MAKING ACCESSIBLE THE ENTIRE PUBLIC INFRASTRUCTURE, CONGRESS DISTINGUISHED FACILITY ACCESSIBILITY FROM PROGRAM ACCESSIBILITY

The statutory and regulatory provisions involved are Title II of the ADA, 42 U.S.C. §§ 12131, *et seq.*, and its implementing regulations, 28 CFR §§ 35.101, *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

A. Title II Requires Program Accessibility To Be Implemented Promptly

Title II of the ADA requires a public entity to provide disabled individuals with immediate access to its "*services, programs or activities.*"[2] It provides:

[2] The Department of Justice's Technical Assistance Manual provides as follows: "Time periods for achieving program accessibility.
(Continued on following page)

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the ***services, programs or activities*** of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (emphasis added).

The language in Section 504 of the Rehabilitation Act is almost identical, requiring a public entity to provide disabled persons with access to its federally-assisted *programs and activities*.

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any ***program or activity*** receiving Federal financial assistance.

29 U.S.C. § 794(a) (emphasis added). "[T]he term 'program or activity' means all the *operations* of" a public entity. 29 U.S.C. § 794(b) (emphasis added).

The plain meaning of these express statutory terms directs the public entity immediately to provide disabled persons with access to the *programs* of the public entity. Prior to this case, the Ninth Circuit and other courts of appeals interpreted the term "program" to mean some

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Public entities must achieve program accessibility by January 26, 1992." DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.6000 (1993) (available at www.usdoj.gov/crt/ada/taman2.html). This manual is prepared as "part of a broader program of technical assistance conducted by the Department of Justice to promote voluntary compliance with the requirements not only of title II, but also of title III of the ADA." *Id.* at Introduction.

form of public "action" or "output." *See Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 531 U.S. 1189 (2001). *See also Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998).

Congress chose its words carefully in constructing a statutory framework to achieve prompt accessibility for disabled persons to the *programs and services* of a public entity. The implementing regulations of Title II of the ADA build on this framework. "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations require immediate compliance with program accessibility but allow the public entity to choose the method to bring its programs and activities into compliance. The regulations provide that:

> [a] public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities.

28 C.F.R. § 35.150(b)(1).

B. Title II Requires Facility Accessibility To Be Implemented Incrementally, As The Public Entity Chooses To Modify Existing Facilities

In contrast to the requirement for prompt implementation of program accessibility, Congress crafted a different standard for facility accessibility, requiring full compliance only after the public entity chooses to alter existing facilities or to construct new facilities. 42 U.S.C. §§ 12146 and 12147(a). This incremental implementation for facility accessibility applies to the entire physical infrastructure of the public entity. The regulations state that:

> *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

28 C.F.R. § 35.104 (emphasis in original).

Recognizing the extraordinary financial cost to modify existing facilities to make them accessible immediately, Congress adopted a plan to achieve universal accessibility to facilities over a reasonable period of time, deferring full accessibility until the public entity chooses to make alterations to existing facilities or to construct new facilities. 42 U.S.C. §§ 12146, 12147. Eventually, all facilities would be altered or replaced with altered or newly constructed facilities, and the public entity would achieve universal accessibility to all facilities. This framework is repeated in the regulations. "A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151." 28 C.F.R. § 35.150(b)(1).

"Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.151(a). Congress, in drafting Title II of the ADA, and the Department of Justice, in drafting the implementing regulations,[3] thus designed a scheme for public entities to prioritize public expenditures eventually to achieve universal facility accessibility over the course of time, with alterations to existing facilities and construction of new facilities. Rather than mandate immediate accessibility to existing facilities, the regulations expressly declare that a "public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section."[4] 28 C.F.R. § 35.150(b)(1).

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[3] The Attorney General, acting through the Department of Justice, is charged with responsibility for promulgating regulations to implement Title II of the ADA. 42 U.S.C. § 12134(a).

[4] "Unlike private entities under title III, public entities are not required to remove barriers from each facility, even if removal is readily achievable. A public entity must make its "programs" accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible. [¶] In contrast, barriers must be removed from places of public accommodation under title III where such removal is 'readily achievable,' without regard to whether the public accommodation's services can be made accessible through other methods." DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.2000 (1993) (available at www.usdoj.gov/crt/ada/taman2.html).

C. Existing Sidewalks Are Facilities

A sidewalk is a facility. 28 C.F.R. § 35.104 ("Facility means all or any portion of . . . roads, walks, passageways. . . . "). A public entity that chooses to make changes to its facilities to achieve program accessibility must develop a transition plan setting forth the steps necessary to complete the changes in facilities. 28 C.F.R. § 35.150(d)(1). The regulations specifically require the transition plan to address one aspect – sidewalks:

> If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

28 C.F.R. § 35.150(d)(2). Thus, the regulations are not silent regarding sidewalks, but expressly describe the one and only manner in which sidewalks should be treated differently from other facilities. Otherwise, a public entity's obligation to make sidewalks accessible (other than where necessary for program accessibility (28 C.F.R. § 31.150(b))) arises only when the public entity chooses to alter the sidewalk (28 C.F.R. § 35.151(b)) or when the public entity chooses to construct a new sidewalk. 28 C.F.R. § 35.151(a).

II. THE NINTH CIRCUIT'S EXPANSIVE AND UNWARRANTED INTERPRETATION OF "PROGRAMS, SERVICES OR ACTIVITIES" IGNORES THE REMEDIAL STRUCTURE ESTABLISHED BY CONGRESS AND IMPOSES AN INORDINATE BURDEN ON LOCAL GOVERNMENT

The Ninth Circuit obliterates the Congressionally crafted distinction between "facilities" and "programs" through a simple syllogism: everything a local government does is a "program, service, or activity" under Title II; local governments "maintain" existing sidewalks, therefore existing sidewalks are a "program" which must be made immediately accessible. Not only does this disregard entirely the structure described above that Congress has crafted to achieve in a feasible manner access to public services, but if uncorrected by this Court, it will impose a crushing burden on local governments, contrary to explicit assumptions underlying the ADA.

A. By Designating The "Maintenance" Of Existing Facilities A "Program" Of Local Government, The Ninth Circuit Obliterates The Distinction Between "Facilities" And "Programs"

The district court below concluded that sidewalks are not a service, program, or activity of the City. *Barden v. City of Sacramento,* 292 F.3d 1073, 1075 (9th Cir. 2002). In rejecting this common-sense conclusion, the Ninth Circuit chose not to examine "whether each function of a city can be characterized as a service, program, or activity for purposes of Title II. . . . " *Id.* at 1076. Rather, the court noted, "we have construed 'the ADA's broad language [as] bring[ing] within its scope 'anything a public entity

does.'" *Id.* Thus, the court declares, "[t]he focus of the inquiry . . . is not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is 'a normal function of a governmental entity.'" *Id.* From this, it was but a short, false step to the court's conclusion: "maintaining public sidewalks is a normal function of a city and without a doubt something that the [City] 'does.' . . . Maintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II." *Id.* (internal quotation marks and citation to *Hason v. Medical Bd.*, 279 F.3d 1167, *cert. granted on other grounds,* 123 S. Ct. 561 (2002 omitted).

The syllogism is flawed in at least two critical respects. First, it ignores entirely the different remedial schemes described above that Congress has established for facilities versus programs. Congress chose to treat the two quite differently, requiring alteration of facilities only where necessary to make programs accessible, or in connection with new construction or alterations. 28 C.F.R. §§ 35.150(a), 35.151(a)-(b). Second, it conflates the two. By artfully inserting the modifier "maintaining" in front of "sidewalks," the Ninth Circuit transforms an object into a function – sidewalks into maintaining sidewalks.[5] The consequences are far more than a matter of semantics. Every facility must be maintained, and so every facility

[5] The regulations recognize that maintaining a facility does not alone trigger accessibility requirements. They impose an obligation on the public entity to maintain accessible features in operable working condition only for newly-constructed or altered features and not for existing facilities. 28 C.F.R. § 35.133(a).

becomes "something local government does." According to the Ninth Circuit, therefore, every facility must be made immediately accessible under the "program, services, or activities" provisions of Title II. As a result, the statutory and regulatory provisions relating to alteration of existing structures, or the construction of new facilities, become superfluous. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks and citation omitted)).

Not only does this disregard entirely the differing remedial schemes Congress established for "facilities" versus "programs," it has dire fiscal consequences for local governments forced to upgrade existing facilities across the board, without regard to whether this is necessary to make programs accessible.

B. If The Error Of The Ninth Circuit Is Not Corrected, The Burden On Local Government Will Be Extraordinary, Contrary To The Premise Upon Which Congress Enacted Title II

In the enactment of the ADA, Congress was very much aware of the enormous difference between the cost of removing barriers from existing facilities and the cost of incorporating barrier-free design into new or altered facilities. As noted in the Report submitted by the House Committee on Education and Labor in connection with HR 2273, the bill that became the ADA:

> Witnesses identified the major areas of discrimination that need to be addressed. The first is lack of physical access to facilities. *Witnesses recognized that it is probably not feasible to require that existing facilities be completely retrofitted to be made accessible. . . .*
>
> Several witnesses also recognized that newly constructed buildups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible.

H.R. REP. NO. 101-485, pt. 2, at 308 (1989) (emphasis added). The same view is reflected in the report of the Congressional Budget Office to the House Committee on Education and Labor:

> H.R. 2273 would mandate that newly constructed state and local public buildings be made accessible to the handicapped. All states currently mandate accessibility in newly constructed state-owned public buildings and therefore would incur little or no costs if this bill were to be enacted. It is possible, however, that some local governments may not have such requirements. These municipalities would incur additional costs for making newly-constructed, locally-owned public buildings accessible if this bill were to become law. According to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construction costs. *This estimate assumes that the accessibility features are included in the original building design. Otherwise, the costs could be much higher.*

Id. at 418-19 (emphasis added).

Thus, Congress intended no crushing burden on local governments, because it assumed, based on the evidence before it, that the costs would not be unreasonable, since only newly constructed (or altered) facilities would be subject to the sweeping accessibility mandate embodied in the statute, and for them the incremental costs would be small. For existing facilities, there was no reason to assume that the cost would be great, since modification would be required only when that was the only way to make a program within the facility accessible to the disabled. *See* 28 C.F.R. § 35.150(b).

The Ninth Circuit's decision conflating facilities and program conflicts fundamentally with these Congressional assumptions. For sidewalks alone the implications are enormous. The City of Sacramento maintains thousands of miles of streets. *See* Petition for Writ of Certiorari at 19. For towns and cities within just the Ninth Circuit, the total approaches nearly 500,000 miles. *See* U.S. DEPARTMENT OF TRANSPORTATION, PUBLIC ROAD AND STREET MILEAGE – 1994 (available at www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf). To require *immediate* widening and resurfacing of all existing walkways that do not meet new construction standards, and to relocate or remove utility poles, fire plugs, and all other obstructions could easily drain the already stressed treasuries of local governments. Congress intended no such thing. To the extent necessary to make the services of local government accessible to the disabled, a cost must be borne by the public entity immediately. But that immediate cost was never meant to include upgrading all existing facilities to

new construction standards without regard to whether such alteration is the only way to make services available.[6] The cost of making all facilities fully accessible will eventually be borne by public entities over the course of time in conjunction with alterations and new construction. However, it is clear that Congress never intended to impose the crushing cost of immediately making all existing facilities fully accessible, which is the inevitable result of the flawed decision issued by the Ninth Circuit.

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[6] It is not enough to say – as the Ninth Circuit implies here – that if its radical remedial scheme imposes an undue burden, local governments may be excused. *See Barden v. City of Sacramento*, 292 F.3d at 1078 n.6. That is not what Congress intended. If modification of an existing facility is not necessary to make a service available, there is no duty under Title II to change it, without regard to the cost of doing so. 28 C.F.R. § 35.150(b)(1) ("a public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section"); *compare* 28 C.F.R. § 36.304 (Title III requires private entities to remove "architectural barriers in existing facilities" only "where such removal is readily achievable"). Cities and counties should not be put to the burden of defending litigation and otherwise incurring costs to gain exemption from a duty Congress has not imposed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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